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HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 60 OF THE LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT 1993

Case Reference:	LON/00AA/OC9/2011/0082
Premises:	Flat 6, 50 – 52 Long Lane, London EC1
Applicant(s):	Mr S M Watson
Respondent(s):	Mr D Lonsdale
Date of Application:	7th December 2011
Date of Hearing:	7th March 2012
Appearance for Applicant(s):	Mr Watson
Appearance for Respondent(s):	Mr Lonsdale
Leasehold Valuation Tribunal:	Mr A A Dutton – chair Mr L Jarero BSc, FRICS
Date of decision:	17th March 2012

Decision of the Tribunal

The Tribunal determines that the sum payable in respect of the costs due from the Respondent to the Applicant under provisions of Section 60 of the Act is £387 plus VAT of 20% (£77.40) totalling £464.40.

Background

1. On 25th March 2011 Mr Lonsdale served notice under Section 42 of the Act on Mr Watson seeking a new lease for the subject premises, Flat 6, 50 – 52 Long Lane, London EC1. The notice gave Mr Watson until 1st June 2011 to file any counter notice.

2. On 7th April 2011 the solicitors instructed to act on behalf of Mr Watson, Hubbard, Pegman and Whitney LLP (HPW) wrote asking for Mr Lonsdale to provide a statutory deposit, although no figure was given, to deduce title, including the freehold and a copy of Mr Lonsdale's lease, and to confirm that access, if so required, would be given. It does not seem that Mr Lonsdale responded to this letter and accordingly on 12th May 2011 a further letter was written to Mr Lonsdale purporting to be a formal notice of default requiring that a statutory deposit be provided and declaring that he had failed to produce evidence of title and had failed to provide access to the property. This letter was responded to by Mr Lonsdale on 1st June. In the meantime, however, HPW served on Mr Lonsdale a counter notice accepting that Mr Lonsdale had the right *"to extend the term"* and proposing a premium of £15,000 compared to the sum of £1,750 put forward by Mr Lonsdale in his initial notice.

3. On 8th June HPW wrote again to Mr Lonsdale this time confirming that the statutory deposit required was £250 and making further comments in respect of the requirement for information and responding to issues raised in that letter of 1st June.

4. On 11th June Mr Lonsdale wrote to HPW stating *"as your client has stated he will sell the Lessees his interest of £35,000 I have now withdrawn my S42 notice and have sent an email to your client to that effect."*

5. There then followed an exchange of correspondence relating to such costs as may be recoverable by Mr Watson under Section 60 of the Act. A draft bill was somewhat surprisingly sent to Mr Lonsdale who wrote to HPW asking for the contract between themselves and Mr Watson, an itemised bill and evidence that the bill had been paid. The draft bill showed a claim for £800 plus VAT. A letter from HPW of 30th June indicated an unwillingness to provide a copy of the contract between themselves and their client Mr Watson but confirmed that the bill had not been paid and that in the view of HPW it was Mr Lonsdale's responsibility to settle the costs.

6. Mr Lonsdale then wrote a lengthy letter on 1st July responding to this querying the draft invoice and setting out what he considered to be his liabilities under Section 60 of the Act.

7. Matters could not be agreed and on 7th December 2011 Mr Watson issued an application seeking recovery of his costs pursuant to Section 91(2)(d) of the Act.

The Hearing

8. The Hearing took place on 7th March 2012. Prior to the commencement we were presented with a bundle of documents which contained copies of the majority of correspondence passing between Mr Lonsdale and HPW as well as correspondence passing between that firm and Mr Watson. There was included within the papers the timesheet from HPW and the copy of the final invoice showing the sum of £800 plus VAT of £160 as being the amount that Mr Watson sought to recover for his costs. It should be noted that the solicitors did not provide any form of statement to support the amount shown on the bill other than the timesheet which contained little in the way of narrative explanation.

9. We heard firstly from Mr Watson. No statements had been lodged by either party. He told us that Mr Lonsdale had served the notice under Section 42 of the Act and that he had incurred legal costs in the sum of £800 plus VAT in dealing with such notice. He had paid those costs. He also sought to recover costs under Schedule 12 paragraph 10 of the Commonhold and Leasehold Reform Act 2002. His case was that any of the costs that he claimed which were not covered by the provisions of Section 60 of the Act should be recoverable under the 2002 Act. He thought that Mr Lonsdale's behaviour in correspondence with HPW, or rather the lack of it, particularly relating to the deposit and the title documents requested, was unreasonable as defined in the schedule to the 2002 Act

10. He told us that he had used HPW for some time and that they were his solicitors who dealt with all landlord and tenant matters. He thought that the ledger sheet showing the time spent was properly incurred and that therefore it was payable. He accepted that no costs after 11th June were recoverable, this being the date upon which Mr Lonsdale withdrew his notice. He accepted therefore that his costs would be limited to the sum of £781.75 plus VAT.

11. Mr Lonsdale then responded setting out the three elements under Section 60 but that it was only Section 60(1)(a) that applied in this case. These were the costs incurred in any investigation reasonably undertaken of the tenant's right to a new lease. He said no costs had been reasonably incurred. Mr Watson, he believed, was a professional landlord with familiarity of the proceedings and already had in his possession copies of Mr Lonsdale's lease and title and was fully aware of his entitlement to enfranchise. The title information was within Mr Watson's knowledge as these had been available in respect of the

forfeiture claim made against Mr Lonsdale. He also thought that 'investigation' meant more than just reading the title documentation and accordingly his view was that no costs were payable by him in respect of any legal fees incurred by Mr Watson. He did, however, accept that the hourly rates put forward by HPW were not unreasonable.

12. He went on to question the draft bill that had been sent out to him which appeared in its initial format to contain no indication of investigating his rights to a new lease. Further he thought that the correspondence relating to the deposit, the deducing of title and access were outside the scope of Section 60 and were not therefore recoverable. His view therefore was that there were the following issues:

    a. Was it appropriate for Mr Watson to instruct a solicitor in the first place

    b. The time spent on considering the notice was too long

    c. That Mr Watson was not entitled to recover the costs associated with the counter notice or any other correspondence relating to the statutory deposit and proceedings under Section 92 of the Act and that Mr Watson could not recover the costs after the counter notice had been served which was 27th May 2011.

13. Mr Watson responded to this indicating that it was Mr Lonsdale's reaction to the request for the deposit and the deducing of title which was unreasonable within the meaning of Schedule 12 of paragraph 10 of the 2002 Act and indeed he doubted the reasoning behind the service of the Section 42 notice when there was so many years unexpired on the existing lease term. He thought that the notice had been served merely as some form of response to the forfeiture proceedings.

14. It was also suggested by us to Mr Watson that as his application had not been made until 7th December 2011 that the provisions of the 2002 Act may not apply proceedings prior to that date.

15. We accept that there is a history between the parties and we note that no offer was made by Mr Lonsdale to settle any form of costs relating to the Section 42 notice. Indeed in an email sent by Mr Lonsdale to Mr Watson in December he says *"I have already made clear to your solicitors that the costs they have claimed are not recoverable under the 1993 Act but of course will accept the determination of the LVT."*

16. In response to our question as to why HPW had not provided any form of witness statement Mr Watson asked that we consider in detail the correspondence included in the bundle which would support in his view the costs that were being claimed.

The Law

17. Section 60 of the Act insofar as it is relevant to this application says as follows:

(1) Where a notice is given under Section 42, then (subject to the provisions of this Section) the Tenant by whom it is given shall be liable, to the extent that they have been incurred by any relevant person in pursuance of the notice, for the reasonable costs of an incidental to any of the following matters, namely –

(a) Any investigation reasonably undertaken of the tenant's right to a new lease;

(b) Any valuation of the tenant's flat obtained for the purpose of fixing the premium or any other amount payable by virtue of Schedule 13 in connection with the grant of a new lease under Section 56;

(c) The grant of a new lease under that section;

but this sub-section shall not apply to any costs if on a sale made voluntarily a stipulation that they were to be borne by the purchaser would be void.

(2) For the purposes of sub-section (1) any costs incurred by a relevant person in respect of professional services rendered by any person shall only be regarded as reasonable if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.

(3) Where by virtue of any provision of this chapter the tenant's notice ceases to have effect, or is deemed to have been withdrawn, at any time, then (subject to sub-section 4) the tenant's liability under this section for costs incurred by any person shall be a liability for costs incurred by him down to that time.

Findings

18. It is accepted that the only element of costs for which Mr Watson is entitled to be paid relates to the investigation reasonably undertaken of the tenant's right to a new lease. It seems to us it would include the review of the tenant's title including presumably a review of the lease and consideration of the registered title to ensure that the tenant has the relevant qualifying entitlement. It also seems to us that the costs associated with the preparation of the counter notice would be recoverable in that they have been incurred in pursuance of and incidental to the notice. Accordingly we find that Mr Watson is entitled to recover the reasonable costs incurred in relation to the consideration of the

initial notice and the service of the counter notice. We do not accept Mr Lonsdale's assertion that Mr Watson, being an experienced landlord, should have dealt with the initial notice and the counter notice himself and was therefore precluded from seeking legal advice. That seems to us to be wrong. Even the institutional land owners in London utilise the services of solicitors in connection with the consideration of the initial notice and the response thereto. Mr Lonsdale confirmed that the hourly rates claimed by HPW were not unreasonable.

19. We cannot, however, accept the costs incurred by Mr Watson in respect of the request made under the Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993 fell within the provisions of Section 60(1)(a). Our reason for so finding is that it is clear from Mr Lonsdale's assertions, which were not denied by Mr Watson, that Mr Watson and presumably his solicitors were in possession of sufficient evidence for them to be able to conclude whether or not Mr Lonsdale was entitled to serve the initial notice. This must be so because despite the request for the production of title documents made to Mr Lonsdale, which he did not deal with, the solicitors for Mr Watson were nonetheless able to file a counter notice in May. We are not aware in any event of there being any penalty for failing to comply with the regulations. The option open to the landlord in the circumstances is to apply to the County Court under Section 92 of the Act when presumably costs would be available. Furthermore, it seems that the correspondence relating to this matter which appeared to request an ability to inspect if required, did not go to the provisions of Section 60(1)(a). We therefore disallow any correspondence or time charges relating to this element.

20. We should also deal with the question of costs under the 2002 Act. Our initial view at the Hearing was that as the application had not been issued until December which was then the date for which proceedings commenced, that none of the actions prior to that would fall within the terms of the Schedule to the 2002 Act. Since that time we have become aware of an Upper Tribunal authority in the case of *Drax v Lawncourt Freehold Limited [LRA/58/2009]* when the member appears to determine that the issue of an initial notice albeit under Section 33 of the Act, was 'proceedings' within the provisions of the 2002 Act. However, we are satisfied that whilst there may indeed be jurisdiction for us to determine whether or not Mr Lonsdale had acted in a manner contrary to the provisions of Schedule 12 paragraph 10 from the time of the initial notice, we are quite satisfied that he has not done so. Paragraph 10 of Schedule 12 to the 2002 Act says as follows:

"(1) A Leasehold Valuation Tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where –

a. *He has made an application to the Leasehold Valuation Tribunal which is dismissed in accordance with regulations made virtue of paragraph 7, or*

b. *He has in the opinion of the Leasehold Valuation Tribunal acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings."*

The costs are of course limited to £500. It seems to us, however, that there is a high benchmark and Mr Watson would need to show that Mr Lonsdale had acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably. Unreasonably in these circumstances has to be read in conjunction with the earlier words. His response to the request for the statutory deposit and other matters was set out in his letter of 1st June which seemed a reasonable stance to take. It is quite clear that Mr Watson did have the necessary information available to determine whether or not Mr Lonsdale had the right to extend his lease and as the valuation put forward by Mr Lonsdale was under £2,000 the question of a deposit is perhaps somewhat irrelevant. Mr Lonsdale had not it seems to us refused the right of access. The initial letter in April merely indicated if access was required.

21. Mr Watson had urged us to consider the correspondence in the bundle before us. We did and it is interesting to note that on 25th May there is the file note from the instructing solicitors (Mr Whitney) following a discussion with Mr Watson which has the following noted:

"DW engaged speaking to Steve Watson. Discussing re the notice. Confirmed I had heard nothing from Lonsdale and potentially tomorrow we could issue proceedings.

Discussing with him. Suggesting that probably there was little benefit given we thought Lonsdale was not going to proceed and perhaps the best thing to do would be to serve counter notice with a covering letter and see what happens.

Discussing with Steve he agreed that was the best course of action given the notice appears to be valid.

Discussing with Steve with regard to price. I suggested we put in a very high price of say £15,000. Checking with him that it would never be worth more than that. He agreed. We would therefore serve the notice on the basis of £15,000.

Engaged discussing and speaking with him 2 units."

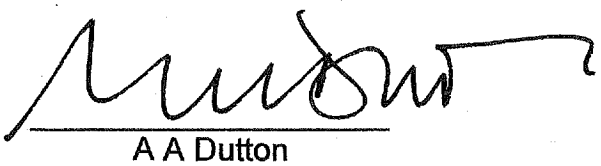
22. This attendance was followed by a letter from Mr Whitney to Mr Watson which in the second paragraph thereof states as follows:

"As discussed on the face of it the notice does appear to be valid and I have therefore served a counter notice on this basis. I confirm that as discussed with you I have proposed a price of £15,000 which is far more than you would expect to get for a lease extension. We will have to wait and see how Mr Lonsdale responds."

23. In days gone by this inflated price for the lease extension could have resulted in the counter notice being struck out. We accept that that now appears not to be the present law but nonetheless it does show an unreasonableness on the part of Mr Watson. For that reason and for the fact that we do not find that Mr Lonsdale had acted unreasonably within the context of Schedule 12 paragraph 10, we find that no costs would be payable in respect of that matter. Accordingly the only costs that we find would be recoverable relate to the provisions of Section 60(1)(a) and not any other issues that passed between the parties.

24. We are disappointed that the solicitors have not provided any evidence as to the work that has been done other than their time ledger. We have, as urged by Mr Watson, been through the file to try and tie up the correspondence with the dates shown on the ledger. It has not been easy. We suspect that the date upon which the work is recorded is not necessarily the date upon which the letter actually left HPW's office. Some of the perusals and attendances appear to relate not only to the work that might be payable under Section 60(1)(a) but to other issues.

25. Doing the best we can we have in considering the time ledger concluded that it would not be unreasonable to spend 42 minutes in considering the initial notice including a review of the title documentation to ascertain Mr Lonsdale's entitlement. Letters to Mr Lonsdale and to the client associated therewith would be recoverable. We are also of the view that the counter notice does fall within the work that is incidental to the initial notice and would accordingly allow 30 minutes for the consideration of such counter notice. This means, therefore, that on a perusal basis we would allow 12 units at £21.50 per unit. Insofar as correspondence is concerned, we would accept that a letter needed to be written to Mr Lonsdale initially and also to Mr Watson, that there would be some communication between HPW and Mr Watson and further correspondence dealing with the counter notice. We are prepared to allow a further 6 units in respect of that time. This gives a total of 18 units which at £21.50 per unit gives a fee of £387. This is the amount that we find is payable by Mr Lonsdale under Section 60 to which of course VAT must be added. For the reasons stated above we do not feel any further costs are recoverable.

Chairman: 

A A Dutton

Date: 17th March 2012